Supreme Court, U.S.
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No. 02-813

In the Supreme Court of the United States

GREEN FIRE & MARINE INSURANCE CO., LTD.,
FKA KUKJE HWAJAE INSURANCE CO., LTD.,
Petitioner,

v.

M/V HYUNDAI LIBERTY, *IN REM*,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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THE GOVERNMENT SUPPORTS THE WRONG PETITION FOR THE WRONG REASONS

Some scholars hold that the Solicitor General "has a duty to interpret the law independently of the other executive agencies that he represents." John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 801 (1992) (citing LINCOLN CAPLAN, THE TENTH JUSTICE 3-4 (1987)). Others claim the Solicitor General's role is to mould the law to the President's policy goals: "Contrary to the conventional account, the Solicitor General has no special obligation to the Court. The Constitution, which defines the relation of each branch to the others, provides for no such obligation, nor does any other legal principle require it." *Id.* at 802 (citing Erwin Griswold, *Review of CHARLES FRIED, ORDER AND LAW*, 3 CONST. 73 (1991)).

The government's briefs in this case and in *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.* (No. 02-1028) exemplify the Solicitor General's lack of obligation to interpret the law. The briefs do not provide a legally sound analysis of the circuit conflict presented by these cases. The government proposes holding Green Fire's petition on the conflicted agency issue pending disposition of *Norfolk* and then suggests the agency issue need not be decided in *Norfolk* (*see* U.S. *Norfolk* Br. at 19), as it must in *Green Fire*. This counterintuitive position stems from the government's decision to favor the interests of the railroad lobby over those of the Federal Maritime Commission (FMC) and the shipping public. Because the government treats the circuit conflict presented in *Green Fire* as merely ancillary to the Himalaya Clause issue in *Norfolk*, we must perforce begin with reasons why this Court should not grant Norfolk's petition.

The government urges the Court to create justice-made law to insulate the railroads from the liability regime established by the Carmack Amendment, 49 U.S.C. § 11706, allowing them to limit liability consistent with the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315, the statute that limits the liability of ships and ocean carriers. *See id.* § 1304(5). The government shows no concern for the deficiencies of Norfolk's petition, *viz.*, that it presents no federal question, comes to this

Court through the district court's diversity jurisdiction, and requires, for reversal, judicial construction of a private contract made in Australia by two Australian firms, with an Australian choice of law. The government, moreover, seems unaware that the conflicts law of Georgia—which applies because Kirby invoked the court's diversity jurisdiction—requires the court to apply the *lex loci contractus* (i.e., Australian law).[1]

Given these uncertworthy features, why does the government recommend a writ in *Norfolk*? Because the Surface Transportation Board (STB) requires it. Under the Interstate Commerce Commission Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, the STB regulates interstate rail carriers. With no history of enforcing the Carmack Amendment—preserved by ICCTA at 49 U.S.C. § 11706—the STB is promoting the interests of its rail constituents over those of the shipping public whom the Carmack Amendment was meant to protect from the railroads' overreaching bargaining power. The STB backs Norfolk's attempt to evade statutory Carmack liability by trying to elicit a ruling that Norfolk may claim the benefit of the through bill of lading issued to Kirby by its Australian freight forwarder, International Cargo Control Pty Ltd. (ICC). This result would allow Norfolk (and in future cases all rail carriers) to enjoy the COGSA package limitation Congress enacted for ocean carriers. But this can only be achieved by reading Norfolk into the Himalaya Clause in the ICC bill of lading. *See James N. Kirby, Pty Ltd. v. Norfolk Southern Ry.*, 300 F.3d 1300, 1308 (11th Cir. 2002). The government warns that the Eleventh Circuit's conclusion that that Himalaya Clause did not confer third-party benefits on Norfolk will deprive "Carriers and Shippers [of any] Viable Means Of Contracting Around The Court Of Appeals' Decision." U.S. *Norfolk* Br. at 14. The government professes that basic principles of contract law bar the railroads from finding shelter in such Himalaya Clauses. Evidently, this Court is expected to afford a "*viable means*" by dispensing with the requirement of contractual privity, as it simply

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[1] *See Convergys Corp. v. Keener*, 276 Ga. 808, 811-12, 582 S.E.2d 84, 86-87 (2003) (answering conflicts question certified by Eleventh Circuit), *adopted by Keener v. Convergys Corp.*, 342 F.3d 1264, 1267 (11th Cir. 2003).

is not "feasible for subcontracting carriers to negotiate directly with cargo owners." U.S. *Norfolk* Br. at 14.

Dismissing such impediments as the contract's choice of Australian law, the court's diversity jurisdiction (and hence the *Erie* doctrine), and Georgia's *lex loci contractus* rule, the government searches for a federal question that would warrant this Court's interest in *Norfolk*, and improvises with a maritime case, *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297 (1958). In *Herd*, this Court denied a stevedore third-party benefits under an ocean carrier's bill of lading because the bill contained no clause identifying as a beneficiary either the stevedore or a class of which it was a member. *Id.* at 302. The court of appeals held the ICC Himalaya Clause did not satisfy *Herd*'s specificity requirement as it did not identify "inland carriers" such as Norfolk. *See Kirby*, 300 F.3d at 1309-11.

Nevertheless, the government believes *Herd* compels the conclusion that ICC's Himalaya Clause "extends the protection of [ICC's] limitation [of liability] to petitioner [Norfolk] *as a subcontractor of ICC's chosen ocean carrier*." U.S. *Norfolk* Br. at 18 (emphasis added). The government asks the Court to revise *Herd* and hold that persons with whom ICC contracts and who thereby become third-party beneficiaries of the Kirby-ICC contract should themselves be deemed empowered to create, by further subcontracts, still more beneficiaries—in effect, *fourth-party* beneficiaries, whose own subcontractors then would be *fifth-party* beneficiaries, and so on *ad libitum*. Under the government's theory, Norfolk is a *fifth-party* beneficiary, for it did not contract with ICC's ostensible third-party beneficiary, the vessel-operating Hamburg Süd, but rather with Columbus Line USA (*see Kirby*, 300 F.3d at 1303), an apparent subsidiary of Hamburg Süd. *See id.* n.3. The government would have this Court alter *Herd*'s reliance on the rules of contract construction and hold that, once the parties to a contract create a third-party beneficiary, their beneficiary unilaterally may extend the contract's benefits to its own subcontractors and, through them, to subsequent generations of subcontractors.

Besides ushering the Court towards this dubious legal morass, the government's *Norfolk* brief does not propose a tenable fed-

eral basis for this Court's interest in, or any subject-matter jurisdiction other than diversity of citizenship for, deciding Norfolk's Himalaya Clause issue. *Herd* apparently reached this Court as a case arising under COGSA, but the Court discerned that COGSA was silent on whether an ocean carrier could extend the benefit of its statutory limitation of liability to a stevedore (*see Herd*, 359 U.S. at 300-03), and ultimately applied common law to construe the bill. *See id.* at 306-08. Although *Herd* does not discuss the basis of subject-matter jurisdiction, it reasonably can be assumed that the Court took it as given that it was interpreting the ocean carrier's bill of lading under the general maritime law of the United States.

Norfolk's petition tries to cast this as a COGSA case and the government's amicus brief adverts repeatedly to COGSA or COGSA's package limitation. *See* U.S. *Norfolk* Br. at 2-3, 14-18. But COGSA no more applies to the third-party benefits claimed by Norfolk than it did the third-party benefits claimed by the stevedore in *Herd*. *See Herd*, 359 U.S. at 301-02. The maritime law would, thus, appear to be the only subject matter on which the railroads and government arguably could base their request for review. The government in fact expresses this belief by titling section I of its brief, "The Petition Presents Important Questions of Maritime Law on Which the Major Maritime Circuits Are Divided." U.S. *Norfolk* Br. at 7.

By relying of necessity on the general maritime law, Norfolk and the government encounter a jurisdictional difficulty that did not beset the stevedore in *Herd*. The stevedore was loading a ship, and its liability arose when it dropped some of the cargo it was loading into Baltimore Bay. *See Herd*, 359 U.S. at 298. This sounds, intuitively, like a proper subject of the maritime law—determining the extent of a stevedore's liability for dropping goods into a navigable waterway of the United States. But Norfolk cannot demonstrate a maritime nexus: It damaged Kirby's goods when the railcar on which they were moving fell off the tracks on the way from Savannah, Georgia to Huntsville, Alabama. *See* U.S. *Norfolk* Br. at 5. Norfolk furnished no maritime service, performed no maritime contract, unloaded no maritime vessel, and dropped no goods into navigable waters of

the United States. There is no maritime jurisdiction of Norfolk's petition, and maritime law does not govern its merits.

If any federal law applies to Norfolk's activities, it is the Carmack Amendment, enacted in 1906 to modify the Interstate Commerce Act, 24 Stat, 386 (1887). As currently codified, Carmack holds rail carriers liable for the actual damages sustained during rail transportation within the federal jurisdiction set forth in ICCTA. *See* 49 U.S.C. § 11706(a), (c)(1). The applicable jurisdiction under ICCTA appears at *id.* § 10501. As the government advises, the Ninth Circuit, interpreting section 10501(2)(F), has held that Carmack applies to "'the inland leg of an overseas shipment conducted under a single "through" bill of lading * * * to the extent that the shipment runs beyond the dominion of [COGSA].'" *See* U.S. *Norfolk* Br. at 11 (citing *Neptune Orient Lines, Ltd. v. Burlington N. & S.F. Ry.*, 213 F.3d 1118, 1119 (9th Cir. 2000)). If *Neptune* is correct, the Carmack Amendment applies statutorily to the interstate leg of the overseas shipment which Norfolk conducted under ICC's through bill of lading because that interstate leg from Savannah to Huntsville ran beyond COGSA's dominion, which ended when Kirby's goods were discharged from the ship at Savannah. *See* COGSA § 1(e), 46 U.S.C. app. § 1301(e).

The government questions *Neptune* by citing cases that construe *repealed versions* of Carmack's jurisdictional provisions.[2] *Neptune* is the only appellate opinion that construes 49 U.S.C. § 10501 as now in force under ICCTA.

Nor is *Norfolk* a proper vehicle for this Court's initial interpretation of whether Carmack preempts a rail carrier's claim to the ocean carrier's limitation of liability. As the government advises, "the Carmack Amendment issue was not raised in the lower courts or in respondents' brief in opposition." U.S. *Norfolk* Br. at 12. The government contends the Carmack issue has

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[2] *See* U.S. *Norfolk* Br. at 12 (citing *Reider v. Thompson*, 339 U.S. 113 (1950) (interpreting 49 U.S.C. § 20(11) (**repealed 1978**)); *Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391 (7th Cir. 1992) (construing former 49 U.S.C. § 10501 (92 Stat. 1359)(**repealed 1995**)); *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987) (***motor carriage*** under 49 U.S.C. § 10521(a)(1)(E)(**repealed 1995**)).

been "waived," *id.*, and urges the Court to resolve the Himalaya Clause issue as though the question of preemption by Carmack does not exist. Yet the waiver of a statutory right by one shipper cannot operate to waive the rights of future Carmack shippers. A waiver in this case cannot produce the general rule sought by the railroads and the government because that rule would contravene the statutory policy behind the Carmack Amendment. This "waiver" argument would produce only a declaration of the rights of Kirby and Norfolk under one bill of lading, not the rights of shippers and rail carriers generally. And, as Kirby's appeal is interlocutory, the Carmack issue would still be open on remand to the district court.

The preemptive effect of the Carmack Amendment reveals why Norfolk's petition and the AAR's brief do not mention it. Concerned that Carmack may apply, the government addresses this omitted issue on their behalf, informing the Court of Norfolk's position, presumably to be disclosed in Norfolk's anticipated brief on the merits, that the interstate rail transportation Norfolk furnished was exempt from Carmack's liability provisions by virtue of 49 U.S.C. § 10709, another ICCTA provision which allows shippers and carriers to contract at arm's length for terms alternative to Carmack. *See* U.S. *Norfolk* Br. at 12. Besides reporting what Norfolk privately represented to the Solicitor General about its position on the Carmack issue, the government's brief propounds a statistical argument by the STB that, during an unspecified period, 56% of all rail transportation under through bills of lading like those in *Neptune* and *Norfolk* was exempt from Carmack liability by virtue of section 10709. Bereft of any record evidence of whether an exemption applies in this case, the government concludes that "the Carmack Amendment's liability rules . . . *do not apply to a large amount of cargo carried by railroads* under such bills, including, *it appears*, Kirby's cargo in this case." U.S. *Norfolk* Br. at 12 (emphases added). If the STB's statistics are accurate, the government's conclusory statement that Norfolk is exempt from Carmack in this case has only a 44% chance of being completely wrong. Under FED. R. CIV. P. 56(c), this statistic would create a genuine issue of material fact. Under the government's analysis, however, it justifies a grant of certiorari.

The government urges this Court to grant Norfolk's petition notwithstanding *Neptune*'s reading of ICCTA's jurisdictional grant, under which the Carmack Amendment's liability scheme would apply. *See Neptune*, 213 F.3d at 1119. Carmack would preempt any contractual provision that purports to bestow on the railroad the ocean carrier's COGSA limitation unless Norfolk could prove it entered into a section 10709 contract with Kirby. *See* 49 U.S.C. § 11706(c). But the Carmack issue was never addressed below, Norfolk thus far has argued only through the Solicitor General that its service was exempt, and there is no record evidence of a putatively exempt contract and only a 56% statistical chance that one actually exists. It is apparent that, in this case, the Solicitor General is not the tenth Justice but an outspoken friend of the railroads.[3]

GREEN FIRE PRESENTS A CIRCUIT CONFLICT THAT SHOULD BE RESOLVED

The government treats the conflict in the circuits in some depth at U.S. *Green Fire* Br. at 8-10. But in its *Norfolk* brief the government loses sight of the circuit conflict by a determined focus on its primary goal of persuading the Court to apply the COGSA limitation to a railroad that may well be subject to countervailing statutory liability under the Carmack Amendment. The government tries to deter interest in *Green Fire* by suggesting that it does not present a clean legal issue: "[T]his case may not cleanly present the question on which the courts of appeals disagree—that is, whether, *absent case-specific factors indicating agency*, an agency relationship exists between a

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[3] So intent is its advocacy that the government simply overlooks two critical difficulties created by Norfolk's reliance on section 10709. First, that section permits contracts between rail carriers and "one or more purchasers of rail services to provide specified services under specified rates and conditions." 49 U.S.C. § 10709(a). Norfolk did not raise this argument below or produce evidence of such a contract with Kirby. That could be difficult, considering Norfolk did not contract directly with Kirby and is, at best, a *fifth-party beneficiary* of ICC's bill of lading. Second, section 10709 expressly withholds federal question jurisdiction: "This section does not confer original jurisdiction on the district courts of the United States based on section 1331 or section 1337 of title 28, United States Code." 49 U.S.C. § 10709(c)(2). Thus, should Norfolk ever produce such a contract in this case, it would have to be interpreted not under federal law but under the *lex loci contractus*.

shipping intermediary (especially an NVOCC) and a cargo owner when the intermediary arranges with a shipowner for transport." U.S. *Green Fire* Br. at 12 (original emphasis).

But the court of appeals' opinion belies the government's argument: "Both commentators and courts have recognized that an NVOCC *generally acts* as the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." *Green Fire* Pet. App. at App. 8—App. 9 (emphasis added). Further, the court noted: "Nothing in the record suggests that the relationship between Doosan [the shipper] and Glory Express [the NVOCC] deviated from *that commercial norm*." *Id.* at App. 10 (emphasis added).[4] These excerpts reveal that the Ninth Circuit held that NVOCCs are agents of the shipper as a "*commercial norm*"—in pointed conflict with the Shipping Act definition of NVOCC, 46 U.S.C. app. § 1702(17)(B), and contrary to *Kirby*, 300 F.3d at 1306-07. The government characterizes the Ninth Circuit's decision as construing a clause in the bill of lading which authorized the NVOCC to use alternate means of conveyance, such as "trucks, trains, or planes." U.S. *Green Fire* Br. at 11-12 (citing Pet. App. at App. 10). This type of clause appears in virtually all bills of lading to protect the carrier from claims that it deviated from the contract by using substitute vessels or vehicles to move the goods. *See Berkshire Fashions, Inc. v. M.V. HAKUSAN II*, 954 F.2d 874, 883 (2d Cir. 1992) (citing GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY 178 (2d ed. 1975)). Such a clause does not confer agency authority on the carrier to bind the shipper to any contract the carrier is required to enter with a subcontractor to obtain a substitute conveyance, a concept readily understood by previous Ninth Circuit panels: *See Sea-Land Service, Inc. v. Lozen Int'l, LLC*, 285 F.3d 808, 817 n.7 (9th Cir. 2002) (explaining this is a "liberty clause" meant to avoid deviation); *Yang Mach. Tool Co. v. Sea-Land Service, Inc.*, 58 F.3d 1350, 1353 n.3 (9th Cir. 1995). By seizing

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[4] "In short, because an NVOCC is considered, *in general, to act* as an agent for the cargo's owner when it contracts for carriage on a vessel, and because in this case Glory Express, consistent with *that commercial norm*, was acting as Doosan's agent when it accepted the Hyundai bill of lading, Plaintiff is bound by that bill." *Id.* at App. 11 (emphases added).

on and misconstruing the liberty clause in the NVOCC's bill of lading, the panel ignored its own circuit precedent; and the government, by uncritically accepting the panel's blatant misconstruction, betrays a similar lack of knowledge about the function of the common liberty clause.

By holding that the NVOCC is "*generally*" and as a matter of "*commercial norm*" the agent of the shipper and binds the shipper to its contract with the vessel-operating carrier, the Ninth Circuit's *Green Fire* holding contradicts the Shipping Act. The Act codifies the regulatory approach of the FMC and its predecessor agency (*see* U.S. *Norfolk* Br. at 19) by defining the NVOCC as a *carrier*, not an agent, in its relations with the shipper, and as a *shipper*, not an agent, when it contracts with the vessel-operating ocean common carrier. *See* U.S. *Green Fire* Br. at 10 (citing 46 U.S.C. app. §§ 1702(6) and (17)(B)).

The Ninth Circuit's contradiction of this statutory definition explains why the FMC participated in the government briefs in *Green Fire* and *Norfolk*. As the agency charged with the duty of enforcing the Shipping Act and of regulating NVOCCs (*see* U.S. *Norfolk* Br. at 10), the FMC has a strong interest in reversal of the Ninth Circuit's circumvention of the Act. To that end the FMC first encouraged Green Fire to file its petition herein and then drafted an amicus curiae brief, which it asked the Solicitor General's permission to file in support of Green Fire's petition. The Solicitor General denied the FMC's request; his willingness to address the FMC's concerns is limited, apparently, to the following recommendation:

> Finally, we have suggested that, if the Court does address the agency issue in *Norfolk Southern*, its analysis should consider the Shipping Act of 1984, . . . including the Act's provisions specifying that, *although NVOCCs operate and are regulated as common carriers, they are shippers in their relationships with vessel-operating common carriers*. . . . If the Court does address the agency issue in *Norfolk Southern*, then its decision may determine the correct resolution of the agency issue in this case.

U.S. *Green Fire* Br. at 10 (citations omitted, emphasis added).

The government does not support Green Fire's petition because it does not present the Himalaya Clause issue so dear to Norfolk, the AAR, and the STB, who apparently wield more clout than the FMC. But *Green Fire* does provide the better vehicle for resolving the *circuit conflict*, both because the NVOCC in this case was licensed as an NVOCC and ICC was not, and because the Shipping Act can be enforced as written only by reversing the Ninth Circuit. The circuit conflict presumably is why these cases are being considered together and why the government does not call for denial of Green Fire's petition. Yet its preoccupation with the railroad lobby's Himalaya Clause issue has prompted the government to conjecture that this Court need not decide the agency issue on which the circuit conflict turns! *See* U.S. *Norfolk* Br. at 19-20; U.S. *Green Fire* Br. at 2.

If the Court grants Green Fire's petition, it can resolve the circuit conflict, which the government admits exists (*see* U.S. *Green Fire* Br. at 8-10), and enforce the statutory definition of NVOCC, so vital to the FMC. *See* U.S. *Norfolk* Br. at 10 ("Congress recognized the important role of shipping intermediaries in the Shipping Act of 1984 . . . which . . . establishes regulatory oversight of their activities by the Federal Maritime Commission.") If *Green Fire* is held pending disposition of Norfolk's petition, as the government urges, this Court will have to interpret an Australian contract under Australian law to decide whether a railroad, in a case sounding in diversity, may limit is liability as a putative *fifth-party* beneficiary of a COGSA bill of lading even though, as the government concedes (*see* U.S. *Norfolk* Br. at 11-12), the railroad's liability may be governed by the statutory prescriptions of the Carmack Amendment, an issue that was neither raised nor decided below.

CONCLUSION

The one issue these cases share in common is whether a carrier that does not operate a vessel is the shipper's agent and binds the shipper to the vessel operator's bill of lading. Because *Norfolk* presents this issue under Australian law and *Green Fire* presents it under the Shipping Act, petitioner respectfully asks the Court to grant the petition in *Green Fire* and hold the petition in *Norfolk* pending disposition of this case on the merits.

Respectfully submitted,

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